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**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6256  
DATE COMPLAINT FILED: February 25, 2010  
DATE OF NOTIFICATION: March 2, 2010  
DATE LAST RESPONSE RECEIVED: April 9, 2010  
DATE ACTIVATED: May 6, 2010

SOL: December 22, 2014-February 8, 2015

COMPLAINANT: Edward Rowen

RESPONDENT: Michael Babich

RELEVANT STATUTES AND REGULATIONS:  
2 U.S.C. § 431(2)  
2 U.S.C. § 432(e)  
2 U.S.C. § 441d(a)  
11 C.F.R. § 100.26  
11 C.F.R. § 100.72  
11 C.F.R. § 100.131  
11 C.F.R. § 101.1(a)  
11 C.F.R. § 102.5  
11 C.F.R. § 102.15  
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Disclosure Report and Statements

FEDERAL AGENCIES CHECKED: None

**I. INTRODUCTION**

The complaint alleges that Michael Babich ("Babich" or "Respondent") knowingly and willfully failed to file a Statement of Candidacy and designate a principal campaign committee in connection with his bid to seek the Republican nomination in California's 4<sup>th</sup> Congressional District despite conducting activities that indicated he was a candidate. It also alleges that Babich knowingly and willfully failed to include disclaimers on an asserted campaign website and on

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1 printed campaign materials he apparently distributed; violated Commission regulations by  
2 soliciting funds on the website for a "study committee" without advising potential donors that the  
3 funds were to be used in a federal election and were subject to the limits and prohibitions of the  
4 Federal Election Campaign Act of 1971, as amended (the "Act"); and impermissibly commingled  
5 campaign receipts with those of the "study committee."<sup>1</sup>

6 As discussed below, we recommend that the Commission: (1) find no reason to believe  
7 that Michael Babich violated 2 U.S.C. § 432(e) and 11 C.F.R. § 101.1(a) by failing to file a timely  
8 Statement of Candidacy prior to its filing on March 13, 2010, because he does not appear to have  
9 become a candidate until March 5, 2010, at the earliest; (2) find no reason to believe that Michael  
10 Babich violated 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a) by failing to include a disclaimer on  
11 the website prior to becoming a candidate because a non-political committee website does not  
12 constitute a "public communication" under 11 C.F.R. § 100.26; (3) exercise its prosecutorial  
13 discretion and dismiss the allegation that Michael Babich violated 2 U.S.C. § 441(d)(a) and  
14 11 C.F.R. § 110.11(a) with respect to a flyer he personally distributed in light of its apparent  
15 limited distribution and low cost; and (4) find no reason to believe that Michael Babich violated  
16 11 C.F.R. §§ 102.5 and 102.15 in connection with solicitations made on the website before he  
17 became a candidate because the solicitations expressly requested funds for a non-campaign entity,

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<sup>1</sup> The complaint also alleges that Babich violated 11 C.F.R. §§ 102.7(a), (b) and (c) by failing to designate a treasurer and accepting contributions and making expenditures in the absence of a treasurer, and 11 C.F.R. §§ 103.1, 103.2, and 103.3 by failing to designate a campaign depository, to notify the Commission of it, and to deposit all political committee receipts into it. These regulations place the specified obligations on a political committee and/or treasurer, however, and not a candidate. Babich's principal campaign committee, Citizens to Elect Michael Babich ("the Committee") did not exist at the time the complaint was filed or notification letter mailed, so it is not a respondent.

| Accordingly, we make no  
recommendations as to the Committee and these alleged violations. We note, though, that despite the lack of formal  
complaint notification, the response states that counsel represents both Babich and the Committee and she filed  
designations of counsel on behalf of both.

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Paypal deposited the minimal funds received in response to it into an account of that entity that was not controlled by Babich, and the funds were not used in connection with Babich's federal election. Accordingly, we also recommend that the Commission close the file.

## **II. FACTUAL AND LEGAL ANALYSIS**

### **A. Factual Background**

According to the complaint, Babich engaged in several activities between December 2009 and February 2010 that caused him to become a "candidate" pursuant to the Act. These activities included: registering and launching a website, [babichforcongress.org](http://babichforcongress.org), on or about December 22, 2009; conducting a signature-gathering campaign in late January 2010 to secure sufficient signatures to qualify for the state ballot; and personally distributing campaign materials on or about February 8, 2010.<sup>2</sup> Complaint at 2-3. The complaint included two screen shots of the website and a copy of the campaign materials, a one-page flyer, Babich allegedly personally distributed. Complaint Exhibits A, B and D.

Both the website and the campaign materials referred to Babich as a candidate for Congress and expressly advocated his candidacy. A screenshot of the website home page prominently featured a banner stating, "Michael Babich for Congress" next to his photo, referred to him as "a new and innovative candidate, California's 4<sup>th</sup> Congressional District," and urged "[l]et's send someone to Congress with the real world experience that will defend our liberties!" Complaint Ex. A. Similarly, the campaign materials the complaint alleges Babich personally distributed consisted of a one-page color flyer printed on plain paper with the same Babich photo as on the website and language similar to that on the website. Complaint Ex. D. The flyer began

<sup>2</sup> The complaint states that Babich was witnessed distributing the flyer on February 8, 2009. We believe this is a typographical error and should read "2010" because the flyer referenced the website, [www.BabichforCongress.org](http://www.BabichforCongress.org), which was not registered until December 22, 2009. See InterNic: Public Information Regarding Internet Domain Name Registration Services at <http://www.internic.net/whois.html>.

1 with the phrase: "Colonel Mike Babich, USAR (Ret.) for U.S. Congress," referred to him as  
2 "[y]our local CA-4th District candidate," exhorted recipients to "[s]end someone to Congress with  
3 real world experience to defend our Liberties!" and urged recipients to "[v]isit  
4 www.BabichforCongress.org" to learn about his ideas. *Id.* Neither the Babich website nor the  
5 flyer contained disclaimers identifying who paid for them.

6 At the time the complaint was filed, the babichforcongress.com website also included a  
7 "Contribute" page with buttons on which an internet user could click to make donations in various  
8 amounts. Complaint Ex. B. The solicitation on the page stated: "The unfortunate fact is that  
9 funds are necessary to 'get the word out.' Any and all contributions are appreciated. At present,  
10 funds go towards a study committee for political instauration<sup>3</sup> of the Sierra Nevada region." The  
11 page also offered donors an option to mail checks payable to "Study Committee for Sierra Nevada  
12 Leadership" in care of Babich. The "Contribute" page contained the same "Michael Babich for  
13 Congress" banner and photo as the home page.

14 Babich filed a Statement of Candidacy designating "Citizens to Elect Mike Babich for  
15 Congress" ("the Committee") on March 13, 2010,<sup>4</sup> eleven days after the complaint notification  
16 letter was mailed. The Committee filed a Statement of Organization on the same day and its 2010  
17 April Quarterly Report on April 15, 2010.

<sup>3</sup> The website and flyer define "instauration" as "the act of restoring; repairing; renewal after decay, lapse or dilapidation."

<sup>4</sup> The response and affidavit state that the Statements of Candidacy and Organization were filed on March 15, 2010. However, FEC indices indicate they were filed on March 13, 2010, based on the postmark and the method of delivery, Express Mail. See 11 C.F.R. § 104.5(e).

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**B. Statement of Candidacy**

Within fifteen days after becoming a candidate under 2 U.S.C. § 431(2), a candidate shall designate his or her principal campaign committee by filing a Statement of Candidacy. *See* 2 U.S.C. § 432(e); 11 C.F.R. § 101.1(a).

An individual becomes a "candidate" for federal office when he or she has received contributions or made expenditures aggregating in excess of \$5,000. 2 U.S.C. § 431(2). The Commission's "testing the waters" regulations create exemptions to the definitions of "contribution" and "expenditure" that permit an individual to receive or spend funds to determine the feasibility of becoming a candidate. *See* 11 C.F.R. §§ 100.72(a); 100.131(a). Certain activities, however, may indicate that an individual has decided to become a candidate and, if the individual has received or expended funds in excess of \$5,000, require the individual to file a Statement of Candidacy with the Commission. These activities include two described in the complaint: making or authorizing written or oral statements that refer to him or her as a candidate for a particular office (11 C.F.R. § 100.72(b)(3); 11 C.F.R. § 100.131(b)(3)), and taking action to qualify for the ballot under state law (11 C.F.R. §§ 100.72(b)(5) and 100.131(b)(5)).<sup>5</sup>

The complaint essentially alleges that Babich had become a candidate on or before February 8, 2010, because he had referred to himself as a candidate on his website and in a flyer that he personally distributed and took action to qualify for the state ballot before that time. It

<sup>5</sup> The response states that the "testing the waters" rules do not apply under the circumstances and that Babich never claimed he was "testing the waters." Response at 2. Yet, it also states that during the relevant period, "[h]e was discussing his candidacy as a potential candidacy with voters and potential supporters to assist him in making the final decision to run for office" (Response at 1-2), and he expended some funds, albeit minimal, in pursuit of his potential candidacy. *See* Babich Affidavit attached to the Response at ¶5 (acknowledges spending about \$450 for a website registration fee and related website expenses and for information cards concerning his potential candidacy). Discussing a potential candidacy to assist in the decision whether to run for office, coupled with making expenditures toward a potential run for federal office, appears to place Babich's activities within the "testing the waters" category. *See* 11 C.F.R. §§ 100.72; 100.131 (the "testing the waters" exemption applies to funds received or payments made to "determine whether an individual should become a candidate.").

1 contains no allegations as to whether the expenditures related to these activities exceeded the  
2 \$5,000 candidate threshold. The complaint also lacks any factual or legal basis for its allegations  
3 that Babich knowingly and willfully failed to file a Statement of Candidacy.

4 Respondent, a first-time candidate for public office, maintains that he timely filed a  
5 Statement of Candidacy because he did not become a candidate until at least March 5, 2010, when  
6 he opened a Committee bank account, although he also states that he had not yet received  
7 contributions or made expenditures in excess of \$5,000 as of that date. Response at 1. With  
8 respect to contributions, Babich specifically states in an affidavit accompanying the response that  
9 he did not solicit or receive any funds in support of his candidacy until March 5, 2010. Babich  
10 Affidavit (Aff.) ¶ 2. He attests that funds solicited through the website prior to that date were for a  
11 Section 501(c)(4) organization that he helped create, the Study Committee for Sierra Nevada  
12 Leadership ("Study Committee"), that only \$700 was received through that mechanism and was  
13 deposited directly into a Study Committee bank account controlled by the organization's treasurer,  
14 and that these funds were not used to support his candidacy. Babich Aff. ¶5. Babich further avers  
15 that all references to the Study Committee were removed from the website when he opened the  
16 Committee account, and that the Committee then opened a new Paypal account for the website.  
17 Babich Aff. ¶ 6. A review of the website as it appeared after the complaint was filed confirmed  
18 that references to the Study Committee were removed.

19 The Committee's 2010 April Quarterly Report ("the Report") appears to corroborate  
20 Babich's statement that he had not received more than \$5,000 in contributions before March 5,  
21 2010. The Report reflects that the Committee received \$10,212 in receipts between March 5 and  
22 March 31, 2010, consisting of \$3,462.67 in contributions from individuals and \$6,750 in personal  
23 funds from Babich comprised of a \$1,750 contribution and a \$5,000 loan. The Committee

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1 received all but \$200 of the contributions from individuals after March 16, 2010. It disclosed no  
2 receipt dates for Babich's personal funds, but disclosed that \$5,634.86 of these funds was  
3 disbursed on March 12, 2010, to pay the required candidate filing fee and for a Statement of  
4 Qualifications for a voter information pamphlet.<sup>6</sup> See Schedule B of the Report and Babich Aff.  
5 ¶¶ 2 and 5. Babich's sworn statement that he opened the Committee account on March 5, 2010,  
6 and the March 12, 2010, disbursement dates indicate the Committee received the funds sometime  
7 during the period of March 5-12, 2010. Thus, it appears that Babich did not receive contributions  
8 in excess of \$5,000 before March 5, 2010.

9 As for expenditures made before March 5, 2010, Babich's affidavit acknowledges that he  
10 spent about \$450 for a website registration fee and related expenses and for "information cards"  
11 concerning his "potential candidacy." Babich Aff. ¶ 5. The Committee's 2010 April Quarterly  
12 Report does not reflect these disbursements. Neither the affidavit nor the Report address the cost  
13 of the campaign flyer except possibly a disclosure in the Report of a \$100 debt owed to Jerry  
14 Southworth/JDS Photo. The only reported disbursements are for the previously mentioned state  
15 filing fee and Statement of Qualifications.<sup>7</sup> However, the flyer attached to the complaint appears  
16 to be a communication produced relatively inexpensively using a computer and color copier. It  
17 consists of varying size text accompanied by a photo of Babich over a background photo and flag  
18 image apparently photocopied on plain paper using a color printer. No information is provided in  
19 the complaint or the response as to how many copies of the flyer were created or distributed. The

<sup>6</sup> The reference to a Statement of Qualifications appears to be a reference to the purchase of space on a portion of a county sample ballot. California law permits U.S. House of Representative candidates to purchase space for a candidate statement on the voter information portion of the county sample ballot. See [http://www.sos.ca.gov/elections/elections\\_and\\_stat.htm](http://www.sos.ca.gov/elections/elections_and_stat.htm).

<sup>7</sup> Babich's apparent failure to report the disbursements for the website, information cards and flyers in the 2010 April Quarterly Report constitutes a reporting violation. See 11 C.F.R. 100.131(a). We make no recommendations with respect to this violation, however, in light of the apparently minimal amounts involved and our recommendations to find no reason to believe or dismiss the violations alleged by the Complainant.

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only information as to the flyer's distribution is the complainant's assertion that someone witnessed Babich personally distributing it, suggesting a limited distribution.

Given the apparent low costs associated with the creation of the flyer, its apparent limited distribution and the minimal expenses attested to by Babich in his affidavit, it appears unlikely that Babich exceeded the \$5,000 expenditure threshold for candidacy before March 3, 2010, the earliest date on which he could have become a candidate. Since he filed his Statement of Candidacy within 15 days of that date, we recommend that the Commission find no reason to believe that Babich violated 2 U.S.C. § 432(e) and 11 C.F.R. § 101.1(a).

**C. Disclaimers**

The complaint also alleges that Babich knowingly and willfully failed to include disclaimers on his website and on the flyer. Complaint at 4. Both the website and flyer expressly advocated Babich's election to Congress. Both communications opened with Babich's name, followed by the phrase "for US Congress," and included similar exhortations to "[s]end someone to Congress with real world experience to defend our [l]iberties." The response does not address the disclaimer allegations.

The Act and Commission regulations require that all public communications paid for by a candidate or a political committee, and all Internet websites of a political committee, must contain a disclaimer clearly stating that the political committee has paid for it. 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 110.11(a)(1) and (b)(1). A public communication that is paid for by any person that expressly advocates the election or defeat of a clearly identified candidate must clearly state it has been paid for by that person and also whether or not it has been authorized by the candidate or the candidate's authorized committee. 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 110.11(a)(2), (b)(2) and (b)(3). A "public communication" is a communication by means of

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1 any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising  
2 facility, mass mailing or telephone bank to the general public or any other form of general public  
3 political advertising. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. Communications over the Internet,  
4 except for communications placed for a fee on another person's website, are not "general public  
5 political advertising," and hence, are not "public communications." 11 C.F.R. § 100.26.

6 Babich acknowledged in his affidavit that he paid for the website. Babich Aff. ¶ 5. Babich  
7 was not a "candidate" before March 5, 2010, however, so the website prior to that time was not the  
8 Internet website of a candidate or political committee requiring a disclaimer pursuant to 11 C.F.R.  
9 § 110.11(a)(1). In addition, because the website was not an Internet communication placed for a  
10 fee on another person's website pursuant to 11 C.F.R. § 100.26, it did not constitute a "public  
11 communication" by any person under 11 C.F.R. § 110.11(a)(2) even though it expressly advocated  
12 Babich's election. Thus, no disclaimer was required on it.<sup>8</sup> Accordingly, we recommend that the  
13 Commission find no reason to believe that Michael Babich violated 2 U.S.C. § 441d(a) and  
14 11 C.F.R. § 110.11(a) in connection with the website.

15 Similarly, the flyer was created, and according to the complaint, distributed, prior to  
16 Babich's candidacy, so it was not a communication made by a candidate or political committee.  
17 Therefore, no disclaimer was required pursuant to 11 C.F.R. § 110.11(a)(1). However, because  
18 the flyer expressly advocated Babich's election, a disclaimer may have been required to the extent  
19 the flyer constituted a "public communication" made by any person under 11 C.F.R.  
20 § 110.11(a)(2).

21 Generally, flyers appear to fit within the term "any other form of general public political  
22 advertising" in the definition of "public communication" because they are expressly included in

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<sup>8</sup> The Committee placed a disclaimer on the website after Babich became a candidate.

1 the enumerated list of print communications for which Commission regulations set out specific  
2 disclaimer requirements. *See* 11 C.F.R. § 110.11(c)(2)(i) ("a disclaimer in 12-point type satisfies  
3 the size requirement . . . when it is used for signs, posters, flyers . . . or other printed  
4 material . . ."); *see also* MUR 4741 (Bono Committee) and MUR 5075 (Casey For Congress)  
5 (pre-BCRA matters concluding that flyers required disclaimers). However, in a post-BCRA case,  
6 the Commission determined that the flyer in question, distributed by hand, was a "handbill" and  
7 did not constitute a public communication, but was divided as to whether handbills could ever fall  
8 into that category. Specifically, in MUR 5604 (Friends of William Mason), one group of  
9 Commissioners concluded that a handbill is not a "general public communication or political  
10 advertising," and hence, not a "public communication," because the Act places "handbills," on the  
11 one hand, and communications such as broadcasting, newspapers and "similar types of general  
12 public communication or political advertising," on the other hand, in different categories, and  
13 further, that the definition of "public communication" is similar to the latter category. *See*  
14 2 U.S.C. §§ 431(8)(B)(ix), (8)(B)(x), (9)(B)(vii), (9)(B)(ix) and 431(22); Statement of Reasons of  
15 Commissioners Toner, Mason and von Spakovsky at 4-5. The other group of Commissioners  
16 agreed that the handbill in that matter, which qualified as exempt materials under the "coattails  
17 exemption," was not a public communication. They disagreed, though, that handbills could never  
18 qualify as public communications, citing as relevant factors who paid for them, how they were  
19 paid for, and whether they were used in connection with volunteer activity. Statement of Reasons  
20 of Commissioners Lenhard, Walther and Weintraub at 3-4. There are no other post-BCRA MURs  
21 squarely addressing this issue.

22 The only information regarding the distribution of the flyer in this matter is the complaint's  
23 assertion that, on information and belief, someone witnessed Babich personally distributing it on a

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1 single day. Under these facts, the flyer in this matter can be considered a handbill. The  
2 Commission, however, need not resolve the issue of whether it was a public communication.  
3 Assuming the complaint's assertion about the distribution is accurate, Babich appears to have  
4 personally distributed the material on a limited basis, he may have effectively identified himself as  
5 the author because he is pictured in it, and the production costs were likely *de minimis*. Under  
6 these circumstances, we recommend that the Commission instead exercise its prosecutorial  
7 discretion and dismiss the allegation that Babich violated 2 U.S.C. § 441d and 11 C.F.R.  
8 § 102.11(a) by failing to include a disclaimer on the material distributed. *See Hechler v. Chaney*,  
9 470 U.S. 821 (1985).

10 **D. Solicitation of Contributions on Pre-Candidacy Website**

11 The complaint's final two allegations, that Babich violated 11 C.F.R. §§ 102.5(a)(2) and  
12 102.15, are premised on the presumption that the pre-March 5, 2010, version of the website was a  
13 political committee website and that the "Contribution" page solicited contributions for Babich's  
14 election. Section 102.5(a) applies to political committees that finance both federal and nonfederal  
15 elections and its purpose is to ensure that only funds subject to the Act's limitations, prohibitions  
16 and reporting requirements are used in federal elections. The purpose of Section 102.5(a)(2) is to  
17 ensure that contributors who contribute to political committees that finance both federal and  
18 nonfederal elections know the intended use of their contributions. *See Explanation and*  
19 *Justification for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*,  
20 67 Fed. Reg. 49064, 49073 (July 29, 2002). To that end, it requires that a contribution deposited  
21 into a federal account meet at least one of three conditions, including two that the complaint  
22 alleges Babich violated: (1) the contribution must result from a solicitation expressly stating that it  
23 will be used in connection with a federal election, or (2) the contributor must be informed that the

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1 contribution is subject to the Act's limitations and prohibitions. Section 102.15 prohibits political  
2 committee funds from being commingled with the personal funds of committee officers, members  
3 or associates or those of any other individual.

4 As discussed, *supra*, Babich had not yet attained candidate status prior to March 5, 2010,  
5 so the website prior to that time was not that of a political committee. The funds solicited on the  
6 "Contribute" page, though appearing in the context of a website that bore the hallmarks of a  
7 campaign website, expressly requested that donations be made payable to the Study Committee.  
8 Babich attested that Paypal deposited the small amount of funds received as a result of the website  
9 solicitation directly into the Study Committee's bank account, which its treasurer controlled, and  
10 none of the funds "have been used or will be used to support" his candidacy. Babich Aff. ¶6. We  
11 have no information to the contrary. Additionally, since the funds solicited did not constitute  
12 contributions received by a political committee and were not placed into a candidate's or a  
13 political committee's bank account but instead were deposited into the Study Committee's  
14 account, the funds were not commingled. Therefore, we recommend that the Commission find no  
15 reason to believe that Michael Babich violated 11 C.F.R. §§ 102.5 and 102.15. We also  
16 recommend that the Commission close the file.

### 17 **III. RECOMMENDATIONS**

- 18 1. Find no reason to believe that Michael Babich violated 2 U.S.C. § 432(e)(1) and  
19 11 C.F.R. § 101.1(a);  
20
- 21 2. Find no reason to believe that Michael Babich violated 2 U.S. C. § 441d and 11 C.F.R.  
22 § 110.11(a) by failing to include a disclaimer on a website.  
23
- 24 3. Dismiss the allegation that Michael Babich violated 2 U.S. C. § 441d and 11 C.F.R.  
25 § 110.11(a) by failing to include a disclaimer on campaign material distributed by  
26 hand;  
27
- 28 4. Find no reason to believe that Michael Babich violated 11 C.F.R.  
29 §§ 102.5(a)(2) and 102.15;

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5. Approve the attached Factual and Legal Analysis;

6. Approve the appropriate letter; and

7. Close the file.

Thomasenia P. Duncan  
General Counsel

Date: August 4, 2010

By:

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